

Abbey Company, LLC v. Lexington Insurance Co., No.07-55484

JUL 25 2008

BYBEE, Circuit Judge, concurring in part and dissenting in part:

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

I concur in the majority's disposition of the jurisdictional question, but I respectfully dissent on the merits. Abbey's insurance policy "insures against all risk of physical loss of or damage to property described herein." The accumulation of debris after a severe storm does not constitute "physical . . . damage to" the channel. Debris naturally accumulates in any river as it flows. One of the purposes of the channel, in directing the Los Angeles River to the Pacific Ocean, is to wash the river's silt and debris into the ocean. Accumulation of debris in the channel is not like a mudslide that buries a road leading to the marina, as the majority states, *see* Majority Op. at 6, because the purpose of a road is to facilitate the flow of vehicles, not mud. Rather, the accumulation of debris in the channel is like a traffic jam on the 405 freeway—a natural and expected occurrence that blocks the flow of traffic to the marina, but by no means causes "damage" to the freeway.

The City of Long Beach had an agreement with Abbey to dredge the channel of debris on a regular basis, which is evidence that accumulation of this debris was a natural and expected occurrence. In holding that the accumulation of debris constitutes "physical damage" to the channel under Abbey's insurance contract, the majority has, in effect, turned an insurance policy against physical damage into

insurance for the City of Long Beach's failure to fulfill its dredging agreement.

I agree with the district court's analysis and would affirm its judgment.